Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Amendment of the Commission's Rules	)	
to Establish Competitive Service	)	
Safeguards for Local Exchange Carrier	)	WT Docket No. 96-162
Provision of Commercial Mobile	)	
Radio Services	)	

REPLY COMMENTS OF GTE

GTE Service Corporation, on behalf of its affiliated domestic telephone and wireless companies

Gail L. Polivy
1850 M Street, NW
Suite 1200
Washington, DC 20004
(202) 463-5214

Their Attorney

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SUMMARY

As documented in GTE's opening Comments, the *Notice* is premised upon several fallacious assumptions. First, the *Notice* assumes that anticompetitive discriminations will arise if non-BOC Tier 1 LECs are not subject to a panoply of new regulatory "safeguards." Second, the *Notice* assumes that regulatory parity considerations require extension of BOC regulatory regimes to non-BOC providers. Third, the *Notice* assumes that its proposed outcome is necessitated by the decision in the *Cincinnati Bell* case. However, these assumptions are neither factually nor legally correct.

The record before the Commission does not reveal a single documented instance during the past decade in which a non-BOC Tier 1 LEC is alleged to have discriminated in favor of its CMRS affiliate. Instead, the parties seeking to saddle Independent Tier 1 LECs with regulatory burdens simply cite hypothetical "opportunities and incentives" for discrimination. In so doing, they conspicuously ignore the absence of past abuses as well as the presence of existing FCC rules and a whole new regime under the 1996 Telecommunications Act ("1996 Act") that ensures interconnection rights for unaffiliated competitors. Just as importantly, they neglect to explain how "opportunity" and "incentives" can plausibly exist with the opening of the local exchange market to unrestricted competition.

The record shows that GTE and other Independent Tier 1 LECs have historically and repeatedly been differentiated from BOCs for regulatory purposes. Indeed, even advocates for expanded LEC/CMRS rules acknowledge that there are critical factual differences between GTE and the BOCs. This is fully consistent with the Commission's own past precedents as well as rulings by Judge Greene and the recent legislation enacted by Congress.

From a legal perspective, neither *Cincinnati Bell* nor regulatory parity considerations support extension of BOC regulation to other Independent Tier 1 LECs. In *Cincinnati Bell*, the court reversed the Commission for unsubstantiated predictive judgments rather than a failure to ensure regulatory parity. Indeed, imposition of new burdens on Independent Tier 1 LECs not shared by their other LEC and non-LEC competitors would move the industry, when viewed as a whole, farther away from regulatory parity.

Finally, this proceeding presents the Commission with an important opportunity to speak out in favor of advancing efficiencies and encouraging innovations that benefit consumers. Rather than shackling GTE and other Independent Tier 1 LECs with constraints on their ability to offer consumers integrated packages of services, the agency should make clear in this docket that hypothetical concerns about theoretical discrimination cannot be bootstrapped into draconian and anticompetitive policies designed to compartmentalize the LEC, CMRS and interexchange ("IXC") services that the public desires to procure through competitive "one stop shopping." In particular, CPNI policies should be premised upon broad buckets of telecommunications services rather than fragmenting CMRS into unjustified piece parts. Accordingly, the barriers that some parties would erect to impede the LECs' ability to engage in joint marketing must be summarily and definitively rejected here and now.

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GTE Service Corporation ("GTE"), on behalf of its affiliated domestic telephone and wireless companies, herewith submits its reply to the opening Comments in the above-captioned proceeding.[1] As detailed below, GTE and other non-Bell Operating Company ("BOC") Tier 1 local exchange carriers ("LECs") have provided telephone and commercial mobile radio services ("CMRS") for well over a decade free from any of the regulatory restrictions set forth in the *Notice*. Yet, a review of the *Notice*, the opening comments and the agency's complaint files fails to reveal a single instance where GTE or any other non-BOC Tier 1 LEC has been accused of discrimination favoring its CMRS affiliate. Accordingly, the Commission must not embark upon unsubstantiated, "predictive judgments" about speculative harms that the Court of Appeals for the Sixth Circuit cautioned against in *Cincinnati Bell v. FCC*.[2] The record before the agency is crystal clear that the proposed extension of new regulatory burdens to non-BOC Tier 1 LECs flies in the face of the facts, the law and the public interest.

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[1] Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services, FCC 96-319 (rel. August 13, 1996) ("*Notice*" or "*NPRM*").

[2] *Cincinnati Bell v. FCC*, 69 F.3d 752 (6th Cir. 1995).

II. THE RECORD IN THIS PROCEEDING COMPELLINGLY DEMONSTRATES THAT THERE IS NO PUBLIC INTEREST BASIS FOR THE IMPOSITION OF THE PROPOSED RULES ON NON-BOC TIER-1 LECS.

A. None Of The Commenters Provide Any Examples Of Actual Anticompetitive Conduct Occurring In The Marketplace.

In the opening round of comments, GTE explained that its review of FCC files maintained by the Enforcement Divisions of both the Common Carrier Bureau and the Wireless Telecommunications Bureau indicated that no GTE Telephone Operating Company ("GTOC") or other non-BOC Tier 1 LEC has been the subject of the types of complaints or allegations of misconduct purportedly to be deterred by the *Notice*'s proposed rules.[3] No commenter in this proceeding has offered any evidence to the contrary. In fact, as SBC Communications, Inc. ("SBC") notes,

> non-BOC LECs with cellular affiliates have had . . . opportunities [to discriminate against other CMRS providers or otherwise act in an anti-competitive manner] for over a decade, and yet abuses did not occur. For example, GTE which is one of the nation's largest local exchange companies and the nation's fourth largest cellular carrier has operated without structural separation rules and without any complaint of cross-subsidization or discrimination. The same is true for Sprint which until the recent spin-off of its cellular operation, owned expansive landline and cellular assets.[4]

Thus, actual market experience shows that the *Notice*'s concerns regarding discrimination or anticompetitive behavior on the part of LECs are unjustified.

Without citing any specific facts, however, AT&T Wireless Services, Inc. ("AT&T") argues for structural separation requirements by citing past LEC failures to provide

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[3] *See* Comments of GTE at 7-8 ("GTE"). (All comments cited were filed in WT Docket No. 96-162 on Oct. 3, 1996 unless otherwise indicated.)

[4] *See* Comments of SBC Communications, Inc., at 4 ("SBC") (*citing The Wireless Marketplace*, Cellular Telephone Industry Association (Spring 1996)).

CMRS providers with mutual compensation.[5] As an initial matter, AT&T's statements here are inconsistent with its position in CC Docket No. 94-54, wherein the Commission's LEC-CMRS interconnection policies were described by AT&T as working satisfactorily.[6] As SBC points out, "[i]f the likelihood of [discrimination and anticompetitive] conduct were of actual concern, would AT&T have spent the money it did to purchase the McCaw operations knowing that they would be competing against BOC and non-BOC LEC cellular affiliates in every market where McCaw operated."[7] Furthermore, AT&T nowhere explains why such concerns are not definitively resolved in any event by the new Section 251 requirements of the 1996 Act. In reality, AT&T's contentions appear to be nothing more than an attempt to impose artificial regulatory burdens on its competition.

The Public Utilities Commission of Ohio ("PUCO") also argues for structurally separate subsidiary requirements, relying heavily on a cellular reseller complaint as its primary justification. Specifically, the PUCO refers to a complaint brought by Cellnet, a reseller of cellular services in Ohio, against GTE Mobilnet, the New Par Companies, and several other CMRS providers, alleging, among other things, that they are "favoring their affiliated retailers over non-affiliated retailers, are offering bundled services through their retail arms at less than cost, and are failing to offer wholesale capacity on [a] wholesale basis."[8] Obviously, this case does *not* involve any alleged discrimination by GTE's telephone company in favor of its cellular affiliate, GTE Mobilnet. Moreover,

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[5] *See* Comments of AT&T Wireless Services, Inc. at 7 ("AT&T").

[6] *See, e.g.*, Comments of AT&T, CC Docket No. 94-54, at 12-13 (filed Sept. 12, 1994); Comments of BellSouth Corporation at 24 ("BellSouth").

[7] *See* SBC at 4-5.

[8] *See* Comments of the Public Utilities Commission of Ohio at 5 ("PUCO").

even the PUCO admits that the Cellnet complaint is "an example of a *potential* case of anticompetitive conduct,"[9] and it offers no real evidence of actual discrimination in the marketplace.[10]

As further support for its argument that structural separation should be imposed on all Tier 1 LECs, the PUCO cites a recently filed application by GTE Long Distance for a Certification of Public Convenience and Necessity ("GTE-LD Application"). According to the PUCO, objections raised by MCI and AT&T caused it to condition the grant of GTE-LD's application on compliance with "the PUCO's separate affiliate requirements and joint marketing prohibition."[11]

Here again, the issues before the PUCO did not involve any alleged discriminatory actions by GTE. Instead, the PUCO was only responding to hypothetical arguments and making predictive judgments rather than actual evidence of misconduct. Significantly, the concerns in question did not involve LEC/CMRS relationships, but rather LEC/IXC relationships which are currently being addressed in the Commission's

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[9] *Id.* (emphasis added).

[10] The PUCO neglects to mention that it has been preliminarily enjoined by the District Court from exercising jurisdiction over the Cellnet complaint except to the extent the case involves "bundling of [cellular] services and equipment." *See GTE MobilNet of Ohio, LP v. David W. Johnson*, Case No. C-2-95-401 (Nov. 22, 1995). The District Court concluded that the PUCO's authority to exercise jurisdiction over the complaint was preempted by the Omnibus Budget Reconciliation Act of 1993 ("OBRA"), which provides that "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service. . . ." *See* 47 U.S.C. § 332(c)(3)(A). Both the PUCO and Cellnet have appealed the District Court order to the Sixth Circuit.

[11] *See* PUCO at 16. It should be noted that the PUCO Order granting the GTE-LD Application was not based upon findings determined after a hearing but was the result of a stipulated settlement between GTE-LD and the IXCs, and was accepted by GTE-LD to avoid a protracted hearing. Although GTE-LD agreed to accept joint marking restrictions so that it could quickly begin providing service in Ohio, it reserved the right to seek relief from this restriction.

this proceeding. There is no justification for the Commission to apply safeguards to a LEC CMRS affiliate simply to maintain symmetrical regulation of LEC CMRS affiliates and LEC IXC affiliates. The Commission's decision to adopt LEC/CMRS safeguards must be based on evidence of abuses in the relevant market.

In sum, the record demonstrates that there is no history of actual anticompetitive conduct occurring in the marketplace that purportedly would be deterred by imposing the proposed rules on non-BOC Tier 1 LECs. "Hyperbole and speculation aside, there is no concrete evidence that a LEC has, can or would use landline market power to distort and impair competition in the CMRS market."[13] As the FCC itself has acknowledged, competitive safeguards should be adopted only "where a demonstrated need exists."[14] GTE notes that, "[h]ere, there is no need for any of the proposed LEC/[CMRS] safeguards."[15]

(..continued)
Provision of Interexchange Service Originating in the LEC's Local Exchange Area, FCC 96-308 (rel. July 18, 1996). Even in this proceeding, the Commission has not proposed joint marketing restrictions between an Independent LEC and its interexchange affiliate.

[13] *See* Comments of Bell Atlantic Corporation and NYNEX Corporation at 14 ("Bell Atlantic/NYNEX").

[14] *Notice*, ¶ 11.

[15] *See* Comments of U S West, Inc. at 6 ("U S West").

B. Many Parties Agree That Existing FCC Rules And Statutory Requirements Provide More Than Adequate Protection Against LEC/CMRS Discrimination Or Anticompetitive Conduct.

1. Congress has enacted a comprehensive scheme governing the interconnection of all telecommunications carriers.

In its opening Comments, GTE detailed the regulatory protections found in Section 251(c) of the 1996 Act and explained that these provisions "ensure that unaffiliated telecommunications carriers gain fair interconnection to an ILEC's network."[16] Similarly, BellSouth points out that Sections 251 and 252 of the 1996 Act, and the rules adopted in the Commission's *Interconnection Order*, "establish a comprehensive scheme that was intended to ensure fair and evenhanded interconnection between the incumbent local exchange carrier and competing providers of service."[17] The *Notice's* suggestion that a separate affiliate requirement will "render visible the LEC's interconnection arrangements with its affiliate"[18]

> was propounded before the Commission had adopted the *Interconnection Order*, . . . and has been rendered moot by the new regulatory scheme. Now that the Commission has determined that Sections 251 and 252 apply to LEC-CMRS interconnection, there is no need for the use of a separate affiliate, structural or otherwise. Under the interconnection scheme established by the new statute, all LEC-CMRS interconnection agreements must be reduced to writing and reviewed by state officials, and their terms are available to other carriers on a nondiscriminatory basis.[19]

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[16] GTE at 10.

[17] BellSouth at 25.

[18] *Notice*, ¶ 123.

[19] BellSouth at 27. *See also* Bell Atlantic/NYNEX at 18; U S West at 6.

As these statutory provisions and interconnection rules serve as an effective check on discriminatory behavior, additional requirements, such as the separation proposed in the *Notice*, therefore are unnecessary.

2. The FCC's existing annual audit process ensures compliance with the agency's accounting, affiliate transaction and cost allocation rules.

In response to the *Notice's* proposal to require LECs to comply with Part 32 and Part 64 cost allocation rules in the provision of CMRS, several commenters noted that these rules are required today for affiliate transactions of the Tier 1 LECs and such carriers already must submit and update their cost accounting manuals. The current rules "provide the Commission with ample information for monitoring and detecting the flow of dollars between LECs and CMRS affiliates."[20] Thus, the FCC's existing accounting safeguards provide interested parties with sufficient information to detect cross-subsidization.[21]

Nonetheless, Comcast and Cox argue that "the Commission must require LECs to disclose fully all costs and revenues associated with CMRS in their ARMIS reports on a line-item basis so that cross-subsidization would be detectable on inspection."[22] However, the FCC has repeatedly refused to modify its accounting rules to make them

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[20] Bell Atlantic/NYNEX at 17.

[21] *See* Comments of Cincinnati Bell Telephone Company at 6 ("CBT"); GTE at 12; Comments of National Telephone Cooperative Association at 5 ("NTCA"); Comments of Pacific Bell, Nevada Bell, Pacific Bell Mobile Services and Pacific Telesis Mobile Services at 4 ("PacTel"); SBC at 5.

[22] *See* Comments of Cox Communications, Inc. at 7 ("Cox"); Comments of Comcast Cellular Communications, Inc. at 13 ("Comcast").

more detailed, concluding that greater detail is not necessary to prevent cross-subsidization.[23]

Nor is there any basis for Comcast's assertion that "incumbent LECs have every incentive to transfer costs from unregulated CMRS ventures to their regulated telephone rate base."[24] As GTE explained in its opening Comments, whatever motivation that may have existed for ILECs to cross-subsidize was eliminated with the 1996 Act and the opening of all markets to competition.[25] In addition, GTE noted that price cap carriers have no incentive to cross-subsidize competitive businesses with regulated revenues as they cannot raise regulated service prices to recoup the subsidy. SBC agrees, stating that

> [w]ith price cap regulation, cross-subsidy issues are no longer a material concern. To the extent a BOC or LEC is still subject to rate-of-return regulation, or the sharing obligation under price cap regulation, the affiliate transaction and cost allocation rules and other accounting safeguards serve as a more than adequate check on identifying and preventing any cross-subsidization concerns.[26]

Finally, the Commission should reject AT&T's proposal to require ILEC affiliates "to issue a separate set of financial reports, including an income statement, a balance sheet, and a statement of cash flows for public review on a quarterly basis."[27] AT&T implies that the Commission's current rules may be insufficient to "identify the true nature and scope of relevant costs," and suggests that its proposed requirement would

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[23] *See, e.g.*, Separation of Costs of Regulated Telephone Service From Costs of Nonregulated Activities, 2 FCC Rcd. 1298, 1337-40 (1987); *Computer III*, Phase I, 104 FCC 2d 958, 1000-12 (1986).

[24] Comcast at 13. *See also* Cox at 7.

[25] GTE at 11.

[26] SBC at 5.

[27] AT&T at 26.

"facilitate the critical auditing function."[28] However, AT&T's newfound concerns fly in the face of its prior assertions that the Commission's joint cost and affiliate transaction rules were more than sufficient to police transactions between AT&T and its then newly acquired McCaw Cellular Communications, Inc.[29]

C. The Acknowledged Differences Between the Independent LECs And The BOCs Render The Application Of The Proposed Safeguards To Independent LECs Unnecessary.

As GTE explained in its opening Comments, even if the Commission could find evidence that Section 22.903 or other separation should continue to apply to the BOCs, similar treatment of Independent LECs simply is not justified.[30] The FCC, the Congress, Judge Greene, and the Justice Department repeatedly have acknowledged that the GTOCs and other Independent LECs are significantly different from BOCs, and have applied substantially different regulation to the former.

To briefly summarize, the material distinctions between Independent LECs and the BOCs arise mainly from the geographical and size characteristics of Independent LEC local exchanges. Independent LECs are much less geographically concentrated than the BOCs, serve less densely populated areas, and offer fewer access lines in any state than do BOCs.[31] Unlike the BOCs, Independent LECs are typically not confined to one particular region of the nation or even of a state, but rather, are scattered

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[28] *Id.* at 25-26.

[29] *See* AT&T's and McCaw's Opposition to Petitions to Deny and Reply to Comments, File No. ENF-93-44, DA 93-1119 (filed Dec. 2, 1993) ("*AT&T/McCaw Opposition to Petitions to Deny Merger Application*").

[30] GTE at 14.

[31] *Id.* at 14-15.

throughout the United States.[32] Independent LECs also have on average smaller switches and transmission facilities than the BOCs, and lack the interexchange network of the more geographically compact BOCs.[33] Consequently, the Independent LECs depend upon interconnection with other LECs for a very substantial portion of their affiliated CMRS systems.

The record confirms that the existence of these material differences strongly mitigates against any presumption that "safeguards" found appropriate for the BOCs are similarly appropriate for Independent LECs.[34] Indeed, even parties advocating expansion of Section 22.903 requirements to all Tier 1 LECs recognize that factual differences between these two types of carriers justify different regulatory treatment for Independent LECs. For example, Comcast explains that, "[a]s the non-BOC Tier 1 LECs do not have the vast expanses of dual wireless and wireline coverage as do the BOCs, they can be distinguished on that basis and could be subject to a different regulatory regime."[35] Similarly, Cox states in its Comments that "[n]on-BOC Tier 1 LECs do not share the large, contiguous combined wireless and wireline coverage enjoyed by the BOCs. Thus, they are distinguishable from the BOCs and could be subject to a different regulatory regime."[36]

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[32] *Id.* at 16.

[33] GTE at 15. *See also* maps at GTE Appendix I.

[34] *See, e.g.,* CBT at 2-4.

[35] Comcast at 8-9.

[36] Cox at 4 n.8.

D. Neither The *Cincinnati Bell* Decision Nor Regulatory Parity Considerations Provide A Basis For The Proposed Rules.

1. Even parties requesting extension of structural safeguards to Tier 1 LECs acknowledge that such safeguards are not required pursuant to the *Cincinnati Bell* decision.

The overwhelming majority of commenters, including RBOC owners of CMRS operations that would allegedly benefit from the "parity" proposal, acknowledge that the proposed safeguards are not required by the *Cincinnati Bell* decision.[37] The court in *Cincinnati Bell* reversed the FCC for unsubstantiated predictive judgments rather than a failure to ensure regulatory parity.[38] Specifically, the court held that the Commission acted arbitrarily and capriciously by retaining Section 22.903 in light of the agency's own findings that the structural separation requirement is unnecessary in the PCS context and that PCS and cellular services are expected to compete for customers on price, quality, and the type and scope of services.[39] The court thus instructed the Commission either to justify the continuing need for structural separation for BOC provision of cellular services, or to remove Section 22.903.

Even those commenters who urge the FCC to retain and expand structural separation requirements recognize that the *Cincinnati Bell* decision does not require this result. Comcast and Cox explain that "*Cincinnati Bell* questioned the Commission's differing treatment of cellular and PCS, not whether structural separation was an

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[37] *See, e.g.,* Comments of Ameritech at 2-3 ("Ameritech); AT&T at 10; Bell Atlantic/NYNEX at 10; BellSouth at 6-7; SBC at 17; U S West at 20.

[38] *Cincinnati Bell*, 69 F.3d 752.

[39] *Id.* at 767-68.

appropriate means of reaching that end."[40] Comcast and Cox further acknowledge that "[e]xpansion of the Section 22.903 requirements to all Tier 1 LECs . . . would not be necessary to meet the Sixth Circuit's mandate."[41]

2. Section 332 of the Omnibus Budget Act is not intended to require absolute regulatory parity or regulatory symmetry without regard to factual differences.

Contrary to the suggestions of some commenters, neither Section 332 of the Communications Act of 1934, as amended, nor the 1996 Act establishes regulatory parity as an independent or sufficient justification for regulation.[42] As GTE noted in its opening Comments, regulatory parity is a legitimate concern of the Commission, but it is not itself a sufficient justification for a rule. Rather, in adopting regulations, the Commission must focus on its statutorily imposed objective or role -- to serve the public interest.[43] Moreover, in amending Section 332, Congress sought to ensure only that "*comparable* mobile services receive *similar* regulatory treatment,"[44] not that "different" services or parties receive "similar" regulatory treatment solely for the sake of regulatory parity. Application of the same regulations to factually disparate parties or services in the name of regulatory parity would be directly contrary to the Commission's statutory mandate and would not withstand judicial review.

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[40] Comcast at 8; Cox at 4 n.8.

[41] *Id.*

[42] *See, e.g.,* Bell Atlantic/NYNEX at 7-8, 20-21.

[43] GTE at 20 (*citing Hawaiian Telephone Co. v. FCC*, 498 F.2d 771, 775-76 (D.C. Cir. 1974)).

[44] *Cincinnati Bell*, 69 F.3d at 767.

3. Congress' failure to extend structural separation to ILECs in the 1996 Act cannot plausibly be interpreted as requiring regulatory parity between BOC and non-BOC provision of CMRS.

Contrary to the suggestion of some commenters,[45] Congress did not signal any intention to extend structural separation requirements to non-BOC ILECs by remaining "silent" on the issue. Such an interpretation of the 1996 Act defies logic. Congress was well aware that non-BOCs were not subject to such obligations when the 1996 Act imposed separate affiliate restrictions on a number of different BOC activities,[46] and, nonetheless, Congress expressly removed restrictions on GTE. Consequently, the 1996 Act was neither "silent" nor intended to serve as a basis for regulatory intrusions that run against the grain of its deregulatory intent.

4. There are no sound grounds for differentiating among non-BOC Tier 1 LECs under a two percent access line benchmark.

Some commenters argue that the requirements which may be adopted for Tier 1 LECs and their affiliates should not apply to rural LECs and their affiliates, particularly those with less than 2 percent of the nation's access lines.[47] A 2 percent benchmark would be wholly arbitrary, and there are no sound arguments offered to support such line drawing. By imposing additional regulatory burdens on all Tier 1 LECs, except those with fewer than 2 percent of the nation's access lines, the FCC would create

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[45] *See, e.g.,* Bell Atlantic/NYNEX at 20-21; BellSouth at 8-9.

[46] *See* 47 U.S.C. §§ 272-273.

[47] *See, e.g.,* Comments of Rural Cellular Association at 5-6; Comments of Rural Telecommunications Group at 3-4; PUCO at 3, 16-17; NTCA at 3-4, 6; CBT at 2-4 (urging adoption of exemption for LECs with less than 2 percent of the nation's access lines); BellSouth at 49-50; Comments of ALLTEL Corporation at 3-5; (urging adoption of exemption for LECs with less than 2 percent of the nation's access lines) ("ALLTEL").

more disparity, thereby nullifying its purported regulatory parity justification for imposing the proposed requirements to non-BOC LECs in the first place.

E. The Imposition Of Separation Rules Would Be Inconsistent With The 1996 Act, As The Comments Underscore.

GTE agrees with those commenters who believe that the *Notice's* proposals to impose separation rules on non-BOC Tier 1 LECs would be inconsistent with the 1996 Act. As Bell Atlantic/NYNEX commented, the Commission itself has recognized that "the Act `fundamentally changes telecommunications regulation,' and replaces the old regulation-heavy approach with `precisely the opposite approach.'"[48] By imposing heavy regulatory burdens on previously unregulated parties, however, the Commission has ignored its own findings of Congressional intent.

In enacting OBRA,[49] Congress found that regulation can distort and actually impair competition, and thus mandated that any regulation of the CMRS industry must be clearly necessary.[50] The 1996 Act, which establishes a "pro-competitive, deregulatory national policy framework," reflects similar concerns, and requires the Commission to remove all regulatory restraints except where specifically justified.[51] Consequently, imposition of the separate affiliate rules on non-BOC Tier 1 LECs would not only be a step backwards, it would also be directly contrary to the congressional intent underlying OBRA as well as the 1996 Act.

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[48] Bell Atlantic/NYNEX at 1-2 (quoting Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket No. 96-98, FCC 96-325, ¶ 1 (released August 8, 1996) *("Interconnection Order"). See also* U S WEST at 2-3.

[49] Pub. L. No. 103-66, Title VI, § 6002(b) (1993).

[50] *See* Bell Atlantic/NYNEX at 5-6.

[51] S. Conf. Rep. No. 104-230 at 1 (1996).

III. THERE IS NO NEED FOR NEW NON-BOC TIER 1 LEC REGULATION LET ALONE THE EXTENSIVE ANTICOMPETITIVE CONDITIONS PROPOSED BY SOME COMMENTERS AND THE FCC.

In its *Notice*, the Commission sought comment on whether it should adopt organizational and procedural guidelines for protection and dissemination of CPNI, in addition to whatever CPNI restrictions are imposed on *all* carriers pursuant to Section 222.[52] As GTE stated in its opening Comments, Section 222 provides for comprehensive regulation of CPNI use and disclosure and does not permit imposition of any additional CPNI restrictions on specific categories of carriers.

The Commission also sought comment on whether, in implementing Section 601(d), it should adopt additional organizational or procedural restrictions to guard against unauthorized use of CPNI in the context of joint marketing of CMRS.[53] While it was suggested that the Commission construe Section 601(d) of the 1996 Act to allow only arms-length, compensatory arrangements for joint marketing by any Tier 1 LEC, these restrictions would be unwarranted. Moreover, they would frustrate the goal of "one-stop shopping" endorsed by both Congress and the Commission.

Finally, the FCC's proposal to require a LEC's CMRS affiliate to obtain any exchange telephone company-provided communications services at tariffed rates and conditions is unwarranted given Sections 251 and 252 of the 1996 Act. Such a requirement, applied only to LEC CMRS affiliates, would place them at a significant competitive disadvantage and create greater disparity in the marketplace.

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[52] *Notice*, ¶¶ 72, 121.

[53] *Notice*, ¶ 73.

A. Proposals by AT&T, Cox, and Others to Establish Unwarranted CPNI Compliance Plans and Requirements Should Be Rejected.

1. Additional rules regarding CPNI would be unwarranted.

The comprehensive statutory scheme set forth in Section 222 renders any additional rules regarding CPNI superfluous. With respect to customer proprietary information, Section 222 states:

> Except as required by law or with the approval of the customer, a telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service shall only use, disclose, or permit access to individually identifiable customer proprietary network information in its provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service. . . .[54]

Because this provision sets forth a comprehensive, balanced CPNI regulatory scheme, the Commission should not adopt any additional restrictions on use or disclosure of CPNI that would apply only to Tier 1 LECs. Section 222 reflects a careful delineation of CPNI obligations; additional FCC restrictions would contradict the statutory structure and be unwarranted.

Imposing additional regulations on CPNI use also would undermine Congress' central purpose in enacting the 1996 legislation: "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."[55] The Commission has recognized that provider access to CPNI permits all customers to

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[54] 47 U.S.C. § 222(c)(1).

[55] S. Conf. Rep. No. 104-458, at 113 (1996).

benefit from integrated marketing.[56] Unnecessarily denying LECs the ability to utilize their own customers' information would frustrate competition by greatly limiting their ability to inform customers of new products and services.

Moreover, neither the Commission nor the commenters have set forth any convincing reasons why the agency should impose additional CPNI restrictions other than those which will be formulated in the ongoing CPNI proceeding. As the Commission itself has acknowledged, adopting requirements of the sort set forth in Section 22.903(f) would limit a customer's disclosure options far more significantly than does Section 222, and in doing so, would "alter the balance between the competitive and consumer privacy concerns embodied in Section 222,"[57] -- a balance which Congress described as *central* to the 1996 Act's CPNI provisions.[58]

2. The most natural reading of Section 222 is that a carrier may use "individually identifiable" CPNI in the marketing and sale of the entire package of telecommunications services that it offers.

The Commission seeks comment on whether the CMRS "bucket" of services should be further divided into subcategories of CMRS for purposes of implementing Section 222's CPNI protections, such that CPNI obtained in providing one type of CMRS could not be used in marketing others.[59] As pointed out by GTE in the Commission's Section 222 rulemaking,[60] even the creation of three distinct "buckets" of

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[56] *Computer III Remand Order*, 6 FCC Rcd 7571, 7610 & n.155 (1991).

[57] *Notice*, ¶ 72.

[58] S. Conf. Rep. No. 104-458, at 205.

[59] *Notice*, ¶ 121.

[60] *See* Comments of GTE, CC Docket 96-115 (filed June 11, 1996).

services (local exchange, interexchange and CMRS) for purposes of sharing CPNI,[61] would represent a strained and inappropriate construction of Section 222. Section 222 permits internal use of CPNI "in its provision of . . . services necessary to, or used in, the provision of such telecommunications service [from which the CPNI is obtained]."[62] The Commission has noted that the 1996 Act can be read as defining telecommunications service "broadly to include all services that the Commission has classified as 'basic' services."[63] The plain language of Section 222, when read in conjunction with this interpretation of the term "telecommunications service," requires the Commission to authorize use of CPNI by a carrier in marketing all of the telecommunications services it offers.

If the Commission rejects GTE's proposed categorization and instead establishes the three service "buckets" suggested in the *CPNI NPRM*, there is no reason to further subdivide the CMRS bucket into various services such as cellular service, PCS, paging, or SMR. As the Commission has recognized, any prior authorization rule is likely to have the effect of restricting CPNI of mass market customers merely by inaction.[64] If the Commission decides to require some form of prior customer authorization pursuant to Section 222(c)(1), subdividing the CMRS bucket for purposes of CPNI consent would unduly hamper the ability of carriers to use CPNI for legitimate business purposes and thwart the pro-competitive thrust of the Act.

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[61] *See Notice of Proposed Rulemaking*, CC Docket No. 96-115, FCC 96-221, ¶ 22 (rel. May 17, 1996) ("*CPNI NPRM*").

[62] 47 U.S.C. § 222(c)(1).

[63] *CPNI NPRM*, ¶ 20.

[64] *Computer III Remand Order*, 6 FCC Rcd at 7610 & n. 155.

Furthermore, neither the Commission nor the commenters have proffered any reason why subdividing a CMRS bucket would better protect customer privacy concerns.

3. The litany of requirements proposed by Cox/Comcast should be rejected.

GTE fully supports Congress' goal of providing appropriate protection to the privacy of telecommunications customers. Congress also emphasized, however, that these privacy concerns must be balanced against the promotion of competition. As GTE has explained in its CPNI Comments, the Commission can strike the appropriate balance between these twin aims by adopting an "opt-in" approval mechanism which allows customers to restrict CPNI use by affirmatively indicating their decision to exercise this option. This approach would best serve the needs of customers and carriers by maintaining the privacy of customers who invoke CPNI restrictions, while giving other customers access to a wide variety of new telecommunications offerings.

In such respects, both Cox and Comcast now propose an identical list of lengthy restrictions on customer approval of CPNI disclosure pursuant to Section 222(c)(1).[65] This burdensome checklist should be rejected by the Commission. Requiring LECs to obtain detailed consent information or multiple consent forms will significantly restrict access to CPNI information because of customer inaction.

B. Joint Marketing Should Be Defined Broadly To Allow Implementation of "One-Stop Shopping."

In its NPRM, the FCC sought comment on whether it should impose additional joint marketing restrictions to protect against unauthorized disclosure of CPNI.[66] As GTE noted, the costs to the public and to non-BOC Tier 1 LECs of more restrictive joint

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[65] *See* Comcast at 15; Cox at 8.

[66] *Notice*, ¶ 73.

marketing requirements would far outweigh any potential benefits. In implementing Section 601(d) of the 1996 Act, the Commission should decline to adopt such measures.

Permitting separate LEC affiliates to provide CMRS services only on an arm's length, compensatory basis would greatly diminish the efficiencies of joint marketing and slow -- if not stop -- the development of innovative new wireless services which require use of a wired network.[67] The *Notice* has identified *no* reasons why CPNI safeguards adopted pursuant to Section 222 will be inadequate to protect CPNI use and disclosure. Nor does the statutory language of Section 601(d) -- which operates only to open up joint marketing to BOCs and other companies -- provide any further rationale for such a restriction. Indeed, the language of Section 601(d), which expressly grants BOCs and other companies joint marketing authority "[n]otwithstanding Section 22.903 of the Commission's regulations or any other Commission regulation," forecloses the Commission's authority to further restrict joint marketing activities to protect against CPNI abuse.[68] Construing Section 601(d) to authorize such regulation would have no basis in statutory language and would frustrate the pro-competitive, deregulatory aims of the 1996 Act.

In the final analysis, any such restrictions on joint marketing would delay the goal of offering "one-stop shopping" to all customers. As the Commission has stated, "the

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[67] For example, GTE's Tele-Go service combines standard telephone features with the advantages of in-home cordless and the away-from-home mobility of wireless. The Tele-Go handset acts like a standard cordless telephone around the house, using the local telephone line to transmit calls. When the Tele-Go handset leaves the home, a special device transfers the signal to the wireless/cellular network, and the phone is completely mobile.

[68] Joint marketing of CMRS remains subject to Sections 271(e)(1) and 272 of the 1996 Act. *See* § 601(d) ("a Bell operating company or any other company may [jointly market and sell commercial mobile services], except as provided in sections 271(e)(1) and 272 of the Communications Act . . ."). Neither of these provisions, which apply only to BOCs, restrict of a non-BOC Tier 1 LEC's joint marketing of CMRS.